

No. _____ 05 - 756 DEC 7 - 2005

OFFICE OF THE CLERK
In The
Supreme Court of the United States

—◆—
NELSON GARCIA,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY FOR THE
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Can the statute of limitations under 28 U.S.C. § 2244(d) governing federal habeas corpus claims of state prisoners be equitably tolled where a state prisoner diligently attempts to comply with that statute of limitations but fails to do so because of his attorney's misconduct as has been held by the Second, Third, Fifth, Eighth and Ninth Circuits; or instead is attorney misconduct not a basis for equitable tolling of that statute as has been held by the Seventh and now the Eleventh Circuits?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding Below	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutory Provision Involved	3
Statement of the Case	4
Reason for Granting the Petition	16
Conclusion	20

APPENDIX

Order of the Eleventh Circuit denying Petitioner's Motion for Reconsideration of his Application for a Certificate of Appealability	App. 1
Order of the Eleventh Circuit denying Petitioner's Application for a Certificate of Appealability and Dismissing his Appeal	App. 3
Order of the United States District Court for the Southern District of Florida Denying Petitioner's Motion for Certificate of Appealability and Order denying request to Proceed <i>in forma pauperis</i>	App. 5
Order of the United States District Court for the Southern District of Florida dismissing Petitioner's petition for writ of habeas corpus	App. 7

TABLE OF CONTENTS – Continued

	Page
Report of the United States Magistrate Judge for the Southern District of Florida recommending dismissal of Petitioner's petition for writ of habeas corpus	App. 8
Order of the District Court of Appeal of Florida, Third District, <i>per curiam</i> affirming Order of Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida denying Petitioner's motion for post-conviction relief.....	App. 19
Order of the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida denying Petitioner's motion for post-conviction relief.....	App. 20
Order of the District Court of Appeal of Florida, Third District, <i>per curiam</i> affirming Petitioner's convictions	App. 29
Judgment of Conviction and Sentence of the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida	App. 30

TABLE OF AUTHORITIES

	Page
CASES	
<i>Artuz v. Bennett</i> , 531 U.S. 4 (2000)	7
<i>Baldayaque v. United States</i> , 338 F.3d 145 (2d Cir. 2003)	17, 18
<i>Bond v. Moore</i> , 309 F.3d 770 (11th Cir. 2002)	7
<i>Calderon v. United States Dist. Court</i> , 128 F.3d 1283 (9th Cir. 1997)	17
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001)	17
<i>Dunlap v. United States</i> , 250 F.3d 1001 (6th Cir. 2001)	17
<i>Garcia v. State</i> , 793 So.2d 955 (Fla. 3d DCA 2001)	2
<i>Garcia v. State</i> , 851 So.2d 168 (Fla. 3d DCA 2003)	1, 5
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1986)	7
<i>Harris v. Hutchinson</i> , 209 F.3d 325 (4th Cir. 2000)	17
<i>Hohn v. United States</i> , 524 U.S. 236 (1998)	2
<i>Kreutzer v. Bowersox</i> , 231 F.3d 460 (8th Cir. 2000)	17
<i>Miller v. Marr</i> , 141 F.3d 976 (10th Cir. 1998)	18
<i>Miller v. N.J. State Dep't of Corrections</i> , 145 F.3d 616 (3d Cir. 1998)	17
<i>Modrowski v. Mote</i> , 322 F.3d 965 (7th Cir. 2003)	19
<i>Nara v. Frank</i> , 264 F.3d 310 (3d Cir. 2001)	18
<i>Neversen v. Farquharson</i> , 366 F.3d 32 (1st Cir. 2004)	17
<i>Pace v. DiGuglielmo</i> , __ U.S. __, 125 S. Ct. 1807 (2005)	17

TABLE OF AUTHORITIES – Continued

	Page
<i>Sandvik v. United States</i> , 177 F.3d 1269 (11th Cir. 1999)	18
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	15, 16
<i>Spitsyn v. Moore</i> , 345 F.3d 796 (9th Cir. 2003)	18
<i>Taliani v. Chrans</i> , 189 F.3d 597 (7th Cir. 1999)	17
<i>Tinker v. Moore</i> , 255 F.3d 1331 (11th Cir. 2001).....	8
<i>United States v. Martin</i> , 408 F.3d 1089 (8th Cir. 2005), <i>overruled on other grounds by Carey v. Saffold</i> , 536 U.S. 214 (2002).....	18
<i>United States v. Pollard</i> , 416 F.3d 48 (D.C. Cir. 2005)	18
<i>United States v. Wynn</i> , 292 F.3d 226 (5th Cir. 2002)....	17, 18

STATUTORY PROVISIONS

Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996)	6
28 U.S.C. § 2244(d).....	3, 8
28 U.S.C. § 2244(d)(1)	6, 9, 17
28 U.S.C. § 2244(d)(1)(A).....	6, 8
28 U.S.C. § 2244(d)(2)	7, 8
28 U.S.C. § 2253(c)(2).....	15, 16
28 U.S.C. § 2254	9
28 U.S.C. § 2255	17

PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the final order of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealability in this case.

OPINIONS BELOW

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for reconsideration of his application for a Certificate of Appealability is reprinted in the appendix at App. 1. The unpublished Order of the Eleventh Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal is reprinted in the appendix at App. 3. The unpublished Order of the United States District Court for the Southern District of Florida (hereinafter "District Court") denying Petitioner's Motion for Certificate of Appealability and Order denying request to Proceed *in forma pauperis* is reprinted in the appendix at App. 5. The unpublished Order of the District Court dismissing Petitioner's petition for writ of habeas corpus is reprinted in the appendix at App. 7. The Report of the United States Magistrate Judge for the Southern District of Florida recommending dismissal of Petitioner's petition for writ of habeas corpus is reprinted in the Appendix at App. 8. The Order of the District Court of Appeal of Florida, Third District, *per curiam* affirming the Order of the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida denying Petitioner's motion for post-conviction relief is reported at *Garcia v. State*, 851 So.2d 168 (Fla. 3d DCA 2003) (table) and reprinted in the Appendix at App. 19. The unpublished Order of the Circuit

Court of the Eleventh Judicial Circuit for Dade County, Florida denying Petitioner's motion for post-conviction relief is reprinted in the Appendix at App. 20. The Order of the District Court of Appeal of Florida, Third District, *per curiam* affirming Petitioner's convictions is reported at *Garcia v. State*, 793 So.2d 955 (Fla. 3d DCA 2001) (table) and reprinted in the Appendix at App. 29. The unpublished Judgment of Conviction and Sentence of the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida is reprinted in the Appendix at App. 30.

JURISDICTION

The Order of the Eleventh Circuit denying Petitioner's application for a Certificate of Appealability and dismissing his appeal was entered on July 6, 2005. (App. 1). The Order of the Eleventh Circuit denying Petitioner's motion for reconsideration of the Eleventh Circuit's Order dated July 6, 2005 denying his application for a Certificate of Appealability was entered on September 8, 2005. This petition for a writ of certiorari is filed within 90 days of that date as required by Supreme Court Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Court has jurisdiction to review a final order of a United States Court of Appeals denying a certificate of appealability. *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY PROVISION INVOLVED

Title 28 United States Code section 2244(d) provides in pertinent part:

(d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.



STATEMENT OF THE CASE

(i) Procedural History

Pursuant to negotiated pleas of guilty, Petitioner Nelson Garcia was convicted of two counts of first degree murder, armed burglary, and attempted first degree murder.¹ (App. 30). He was sentenced to multiple terms of life imprisonment without parole. (App. 35). Petitioner prosecuted a direct appeal from his conviction. On August 15, 2001, the Florida appellate court *per curiam* affirmed the convictions without written opinion. *Garcia v. State*, 793 So.2d 955 (Fla. 3 DCA 2001) (table). (App. 29). The mandate issued on August 31, 2001. Approximately sixteen months later, on December 20, 2002, Petitioner challenged his pleas of guilty as involuntarily entered on various grounds by filing, through counsel, a motion for

¹ In brief, the facts of this case as revealed during the change of plea and sentence proceeding are as follows: Prior to the subject criminal incident, Petitioner, a former police officer, had altercations with his wife resulting in her leaving the marital home with her two children from the marriage, ages eight and six. A few days after his wife left the home, Petitioner appeared at the home of his wife's relative where his wife and the children were present with other family members. Petitioner was armed with a gun. He pointed the gun at his wife and other family members. He then shot and killed his wife outside of the house. Petitioner's eight-year-old daughter witnessed the shooting and yelled for Petitioner to stop. Petitioner turned and shot his daughter in the head. At a competency hearing prior to Petitioner's change of plea, five mental health professionals testified that Petitioner had amnesia regarding the offense. Petitioner's competency to stand trial was hotly contested. Two mental health professionals testified that Petitioner was not competent to stand trial. Another of these mental health professionals testified that he had doubts about Petitioner's competency to stand trial but subsequently changed his mind and stated that Petitioner was competent. Two other mental health professionals testified that Petitioner was competent but severely depressed and suicidal.

post-conviction relief pursuant to Fla.R.Crim.P. 3.850.² On May 1, 2003, the trial court denied Petitioner's motion for post-conviction relief. (App. 20). Petitioner then timely took an appeal from the trial court's ruling. On July 23, 2003, the denial of post-conviction relief was *per curiam* affirmed without written opinion by the appellate court. *Garcia v. State*, 851 So.2d 168 (Fla. 3 DCA 2003) (table). (App. 19). The mandate issued on August 8, 2003.

Approximately nine months later, on May 4, 2004, Petitioner filed a *pro se* petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254 challenging his convictions.³ In response to an order to show

² In his Motion for Post-Conviction Relief, Petitioner raised the following issues:

- (1) Trial counsel rendered ineffective assistance of counsel in failing to request a pre-plea psychological evaluation of petitioner;
- (2) Trial counsel rendered ineffective assistance of counsel because he failed to seek a P.E.T. scan or brain scan of Petitioner;
- (3) Petitioner was coerced into pleading guilty by a police detective who was a state witness;
- (4) Petitioner was not competent to enter a plea of guilty.

³ In Petitioner's federal habeas corpus petition, he raised the following claims:

- (1) Petitioner's constitutional rights to a jury trial and to present a defense were violated because the trial court refused to permit him to plead not guilty by reason of insanity despite the testimony of numerous experts that he was not competent;
- (2) Petitioner was coerced into pleading guilty by a police detective who was a state witness and because the trial court denied him his only viable defense, insanity;
- (3) Petitioner's trial counsel rendered ineffective assistance of counsel because he (a) failed to seek a P.E.T.

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